*Before Mr. Justice Birch and Mr. Justice Mitter.*

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LUCKHY NARAIN (DECREE-HOLDER) *v.* KALLY PUDDO BANERJEE (JUDGMENT-DEBTOR).*

*Mesne Profits, Interest on—Principle on which they should be Assessed.*

In determining the amount payable to the holder of a decree for mesne profits, a Court is bound to consider, not what has been, or what with good management might have been, realized by the party in wrongful possession, but what the decree-holder would have realized if he had not been wrongfully dispossessed. Under a decree for mesne profits, the decree-holder is entitled to interest on such profits from the time at which they would have come to him if he had not been dispossessed.

IN this case the decree-holder, Luckhy Narain Roy Chowdry, had been dispossessed, under a decree of Court, of a 9-anna share of a zemindari; the remaining 7-anna share of which was not affected by the decree, and continued in his possession. This decree being subsequently reversed, he had sued for and obtained a decree for mesne profits for the period during which he had been dispossessed. The decree-holder offered to prove the amount which he had actually realized from the 7-anna share during the period of his dispossession, and claimed that the amount payable to him in respect of the 9-anna share should be determined with reference to the amount that had been realized from the 7-anna share, and that he was, therefore, entitled to a sum equal to nine-sevenths of what he had realized from the 7-anna share of which he had retained quiet possession. He also claimed to be entitled to interest on such mesne profits from the time at which it was found due to him, *i. e.*, the time at which the profits would, if he had been in possession, have come to him.

The lower Court held that the decree-holder was entitled to recover as mesne profits, not what he "by another course of

* Appeal from Original Order, No. 224 of 1878, against the order of W. Macpherson, Esq., Officiating Judge of Cuttack, dated the 1st of June 1878.

management" (that is, by a course of management other than that which had been adopted by the party in wrongful possession) "might have realized, but what the party in wrongful possession did really realize, or might by good management have realized." It also held that it was not within its power to award interest on the mesne profits as claimed. From this decision the decree-holder appealed to the High Court.

Mr. *R. E. Twidale* for the appellant.

The respondent did not appear.

The judgment of the Court was delivered by

BIRCH, J. (MITTER, J., concurring).—In this case we think that the order of the Judge cannot be supported, as he has proceeded upon a wrong principle. It seems that some accounts were filed by the decree-holder showing the rents payable by the farmers of the estate under the arrangement subsisting before the dispossession; but they have not been sent up to this Court. Probably they have by mistake remained in the lower Court. The principle upon which wasilat should be estimated in this case, is to ascertain from the decree-holder what sum he has realized in respect of the 7-anna share which remained in his possession during the years for which wasilat is claimed, and on a comparison of his account as to that 7-anna, it will be easy to fix the proportionate amount due upon the 9-anna share from which he was dispossessed under the decree of this Court. The Judge remarks that "the point he has to consider is, not what the the decree-holder might by another course of management have realized during the period in question, but what the party in wrongful possession did really realize or might by good management have realized." In this view we cannot agree with the Judge. What he has to consider is, what the decree-holder would have realized had the arrangement prevailing at the time of dispossession subsisted all along, and upon that he would estimate wasilat. In this view of the case the question regarding the allowance of collection charges will not arise.

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There is a further prayer that interest may be allowed on the wasilat. On this point the Judge says: "I do not think it is within my power to award such interest, and I accordingly reject this part of the claim." In this view also we think the Judge is wrong. The question of allowing interest upon mesne profits has often been decided by the Courts in this country, and has also come under the consideration of their Lordships in the Privy Council. One decision to which we have been referred is the case of *Hurropersaud Roy* v. *Shamapersaud Roy* (1); and there is another case—*Alexander Rodger* v. *The Comptoir D'Escompte de Paris and the Chartered Bank of India, Australia, and China* (2)—in which the following remarks are made:—"It is contended on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and, that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at, unless the persons, who have had their money improperly taken from them, have the money restored to them with interest during the time that the money has been withheld. Their Lordships have reason to believe that the practice of the Courts in India, where there has been a reversal in this country, and when money has been ordered in India to be paid back in consequence of that rever-

(1) I. L. R., 3 Calc., 654. (2) L. R., 3 P. C., 465.

sal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favour of a restitution of the money with interest."

The case must go back to the Judge that he may reconsider it with reference to the above remarks. The appellant is entitled to his costs of this appeal.

*Case remanded.*

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*Before Mr. Justice White and Mr. Justice Mitter.*

BROJENDER COOMAR (PLAINTIFF) *v.* BROMOMOYE CHOWDHRANI (DEFENDANT).*

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*Act XVIII of* 1869, *sched. ii, art. 5—Stamp Act—Stamp on entry in Hatchitta.*

When an account in a hatchitta has two sides to it, the one headed 'amount advanced,' and the other headed 'amount received'; and the amount actually due on such account varies from time to time, and depends upon the relation of the amount advanced to the amount received, and the signature or seal of the borrower is affixed to each entry showing an advance, such an entry is not a note or memorandum whereby any debt is acknowledged to be due, and does not require a stamp under art. 5, sched. ii of Act XVIII of 1869.

Baboo *Sree Nath Dass* and Baboo *Kalichurn Bannerjee* for the appellant.

Baboo *Mohini Mohun Roy* and Baboo *Baikant Nath Das* for the respondents.

The facts of this case, so far as they are material to the question of whether or not a stamp was necessary, sufficiently appear from the judgment which was delivered by

WHITE, J.—The plaintiff, Brojendro Coomar Roy Chowdhry,

* Regular Appeal, No. 101 of 1877, against the decree of Baboo Nobin Chunder Pal, Roy Bahadur, Second Subordinate Judge of Dacca, dated the 1st February 1877.